



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

ELC CASE NO. 128 OF 2012

ISAAC M.M. MAKHAMBALA.....PLAINTIFF

VERSUS

RICHARD OMBIMO.....DEFENDANT

JUDGMENT

1. In an amended plaint dated **16/12/2014**, the plaintiff in this suit sought for the following orders against the defendant:

(a) **An eviction order;**

(b) **A Permanent injunction restraining the defendant whether by himself, his servants, relatives, agents or any other persons claiming through him howsoever from tilling, working and or in any other way having the use and enjoyment of land parcel No. Kwanza/Kwanza Block 3/Luhya/328 measuring 1.214 Ha without the consent of the plaintiff and/or in any manner in consistent with the plaintiff's rights thereon;**

(c) **Interest;**

(d) **Cost of this suit;**

(e) **Any other relief this court may deem fit to grant.**

PLEADINGS

The Plaint

2. In his amended plaint, the plaintiff averred that in the year **1990** the father to both parties shared out land parcel number **Kwanza/Kwanza Block 3/Luhya/328** among his sons, with the plaintiff being allocated a resultant subdivision named **Kwanza/Kwanza Block 3/Luhya/328** which he leased to the defendant on **20/12/1992** whereupon the defendant paid a deposit of **Ksh 1200** pursuant to the lease. The plaintiff's claim is that the defendant has refused to vacate the said parcel and has accumulated arrears of rent for a period of **21** years amounting to **Ksh 37,800/=**, hence the suit.

The Defence and Counterclaim

3. In the statement of defence and counterclaim dated **17/1/2013** and filed through Sifuna & Sifuna Advocates, the defendant denied the plaintiff's claim. He averred that the land subject matter of the suit belonged to their father *Brown Mbito Kusienya* who had three wives and who died intestate on **14/9/1992**; that succession proceedings in respect of the estate have not been conducted; that the deceased had two land parcels, one being **Kwanza/Kwanza Block 3/Luhya/16** which is occupied by the families of the 2nd and 3rd wives and another located in **Kabras, Kakamega** whose land reference number was not provided, measuring **18 acres** which is occupied by the family of the 1st wife.

4. The defendant reiterated the matters contained in his defence in the counterclaim and stated that the land parcel **Kwanza/Kwanza Block 3/Luhya/16** was the subject of **Kwanza Land Dispute Tribunal Case Number 37 of 2006** whose award was that the land should be made the subject of succession proceedings to allow for subdivision thereof. However, the defendant learnt through the plaintiff's bundle of documents in this suit that while the tribunal case was still pending the plaintiff, without the knowledge and consent of the family, fraudulently subdivided the parcel **Kwanza/Kwanza Block 3/Luhya/16** and registered himself as the proprietor of the larger portion among the subdivisions. He states that such registration having been effected about **14** years after the demise of their father and without any grant of letters of administration, was fraudulent. He prays for a declaration that the subdivision and mutation of the land parcel **Kwanza/Kwanza Block 3/Luhya/16** into three parcels and subsequent issuance of title deeds on **27/3/2006** without prior succession proceedings and a grant of letters of administration in respect of their deceased father's estate was wrongful. He also prays for cancellation of the subdivision and

mutation and the resultant title deeds as well as costs of the suit.

EVIDENCE

The Plaintiff's evidence

5. **PW1**, the plaintiff herein testified on **9/10/2019**. The gist of his testimony is that the defendant is his stepbrother; that before their father passed on he made provision for the three separate houses that formed his family; that parcel no. **Kwanza/Kwanza Block 3/Luhya/16** measured **23.5 acres**; that his mother got **6 acres**; that the defendant's mother got **9.5 acres** and the third house got **8 acres** and title deeds were issued in respect thereof. That later the portion given to his family was subdivided amongst the sons in the family; that he got **3 acres**; that the parcel he got was issued the number **Kwanza/Kwanza Block 3/Luhya/328**; that in **1993** he decided to lease the portion to the defendant instead of strangers; that the defendant failed to vacate the land after the lease expired and has stayed on the land to date without the plaintiff's consent.

6. Upon cross examination he admitted that his father died in **1992**; that the land parcel **Kwanza/Kwanza Block 3/Luhya/328** is a subdivision of **Kwanza/Kwanza Block 3/Luhya/16**; that he was issued with title to **Kwanza/Kwanza Block 3/Luhya/328** in **2014**; that though he had no evidence to prove it, his parcel was transferred to him by his mother. He maintained that the land was not allocated to his father but to the family; that the land was registered in the name of the plaintiff and his brothers after his father had died; that if any errors were made in that registration the society should be responsible; that he does not know the decree in **Land Case Number 85 of 2007**; that he never filed succession proceedings in respect of his father's estate and that he conducted subdivision of **Kwanza/Kwanza Block 3/Luhya/16** in **2012** giving rise to his parcel. He also admitted that he has never lived on the suit land.

The Defendant's Evidence.

7. **DW1**, the defendant testified on **27/11/2019**. He stated that the plaintiff is his half-brother from the elder wife's house; that his father died in **1992**; that it was decided at a Land Disputes Tribunal case that succession be conducted in respect of the deceased's property in **Kwanza/Kwanza Block 3/Luhya/16**; that the plaintiff however subdivided the land without the defendant's consent; that the land belonged to his father and should have been registered in his name; that succession proceedings had not been instituted by the time of the subdivision. He prayed that the plaintiff's case be dismissed and succession proceedings be conducted in respect of the deceased's property. However on cross examination he conceded that the entries on the register did not reflect his father's name.

8. The defendant then closed his case.

Submissions

9. In his written submissions filed on **6/12/2019**, counsel for the plaintiff submitted that the plaintiff is the proprietor of the portion registered as **Kwanza/Kwanza Block 3/Luhya/328** with indefeasible rights; that no explanation has been given as to why the defendant never filed succession proceedings; that there is no probability that the titles could have been issued in secrecy; that the family patriarch had shared out his estate prior to his death hence no one pursued succession; that the titles were issued more than **20** years ago and they have never been challenged in court.

10. The defendant filed his submissions on **20/1/2020**. Counsel for the defendant submitted that the plaintiff had admitted in his evidence that the suit land had belonged to the parties' father but had failed to prove that the deceased shared out the land **Kwanza/Kwanza Block 3/Luhya/16** in **1990**; that the plaintiff admitted that he has never occupied any part of that parcel; that two wives of the deceased had been settled on the suit property; that the plaintiff never proved the existence of a lease between him and the defendant; that the copy of register produced by the defendant had established that as at **1994** the plaintiff was not the registered owner of the land and hence could not lease any land to the defendant; that the judgment in **Kitale CMC Land Case No 85 Of 2007** was never appealed and the plaintiff subdivided the property notwithstanding the decree in that case. It was further submitted that the proceedings in **Kitale CMC Land Case No 85 of 2007** showed that the suit land did not belong to any of the parties but to their father, and in any event the plaintiff had not established that the persons registered as proprietors had been involved in the subdivision of the suit land.

DETERMINATION

Issues for Determination

11. The issues that present themselves for determination in this suit are as follows;

(a) **Whether orders of eviction and permanent injunction restraining the defendant and his agents from tilling, working and or in any other way having the use and enjoyment of land parcel No. Kwanza/Kwanza Block 3/Luhya/328 should issue;**

(b) **Whether the title issued initially over the suit land and the subdivision and mutation of the suit land and the resultant title deeds should be cancelled as sought in the counterclaim.**

(c) **Who is to bear the costs of the suit and the counterclaim?**

The issues are addressed hereunder.

(a) Whether orders of eviction and Permanent injunction restraining the defendant and his agents from tilling, working and or in any other way having the use and enjoyment of land parcel No. Kwanza/Kwanza Block 3/Luhya/328 should issue;

12. After a careful analysis of the record I find that the matters arising in the land dispute tribunal proceeding have much relevance to this case. It was observed in those proceedings as follows:

- a. That other than the suit property *Brown Mbito Kusienya* had other land at *Kakamega*;
- b. That as at the time of his death not all his property had been distributed.
- c. That the defendant's mother *Esther Nabasakwa* and *Selina Nasambu*, the 3rd wife of the had not gotten any share of the land in *Kakamega* and had raised that complaint in the tribunal proceedings;
- d. That only two of the deceased's sons had been given land at *Kakamega* and the whole land measuring **18** acres had not been subdivided wholly.
- e. That the first wife had an aggregate of **24** acres from both parcels while the 2nd and 3rd wife had no land at *Kakamega*.

13. The tribunal decision was to the effect that the family should institute succession proceedings not only in respect of the suit land but all the deceased's properties. This award was adopted by the Chief Magistrates court. The plaintiff has not demonstrated that he appealed that decision or otherwise had the decree and the award set aside.

14. The plaintiff does not assert that he bought the suit land by his own efforts. In his evidence on cross examination he conceded that the land had belonged to his father. He attempted to shift blame onto the Society which he alleged had caused the registration of the land in names of persons other than his father.

15. He also admitted to not having sought letters of administration to his late father's estate authorizing the distribution of the land.

16. Though he purported to be ignorant of the **Land Case No 85 Of 2007**, it is clear that even his ignorance of that case can not alter his admission that the land belonged to his father and that he did not obtain letters of administration before causing the same to be registered in names other than his late father's, or before effecting subdivision thereof; it does not also alter the fact that the plaintiff admitted at the hearing that his father had other properties. It appeared that the tribunal was well informed of the properties of the deceased and the lack of letters of administration to his estate hence the award.

17. In this court's view sufficient evidence has been brought to the fore to show that the registration of the plaintiff and other persons as the proprietors of the suit land without having gone through the process of succession was irregular illegal and fraudulent.

18. It mattered not that the land was registered or not at the time of the demise of the plaintiff's father. It was his property nevertheless, and it should have remained part of his estate till distribution upon conclusion of succession proceedings.

19. For the foregoing reasons I find that the plaintiff does not deserve the orders sought in his plaint in respect of this issue.

(b) Whether the title issued initially over the suit land and the subdivision and mutation of the suit land and the resultant title deeds should be canceled as sought in the counterclaim and the title be registered in the name of the estate of the deceased.

20. This court has already established that the registration of the land in the names of persons other than the estate of the deceased was illegal and that the subdivision of the suit land without a grant of letters of administration was fraudulent.

21. The property of a deceased person must be handled in accordance with the law. The appropriate law in this case is the **Law of Succession Act, Cap 160. Section 47** of that Act provides as follows:

“The High Court shall have jurisdiction to entertain any application and determine any dispute under this Act and to pronounce such decrees and make such orders therein as may be expedient:

Provided that the High Court may for the purpose of this section be represented by Resident Magistrates appointed by the Chief Justice.”

22. Any person who deals with the property of a deceased person other than in the manner authorized by court is deemed an intermeddler.

1) Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.

(2) Any person who contravenes the provisions of this section shall—

(a) be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to a term of imprisonment not exceeding one year or to both such fine and imprisonment; and

(b) be answerable to the rightful executor or administrator, to the extent of the assets with which he has intermeddled after deducting any payments made in the due course of administration.

23. I find that in view of the above self-explanatory provisions it would be proper to nullify the titles issued in respect of the suit land and the subdivision thereof. The defendant's counterclaim therefore has merit.

CONCLUSION.

(c) Who is to bear the costs of the suit?

24. The plaintiff occasioned this dispute by his actions and omissions and he ought to bear the costs of both the suit and the counterclaim.

25. The plaintiff has failed to establish his claim on a balance of probabilities while the defendant has proved his counterclaim on a balance of probabilities.

26. In the final analysis I hereby enter judgment in favour of the defendant in both the main suit and the counterclaim and I issue the following final orders:

a. The plaintiff's claim in the main suit is hereby dismissed.

b. Judgment is hereby entered in favour of the defendant on his counterclaim.

c. All the titles issued in any other name other than that of Brown Mbito Kusienya respect of all that land parcel known as Kwanza/Kwanza Block 3/Luhya/16 and its subdivisions and mutation are hereby canceled.

d. The title to the suit land shall be registered in the name of the "Estate of Brown Mbito Kusienya (deceased,)" pending distribution upon completion of succession proceedings.

e. The plaintiff in the main suit shall bear the costs of the main suit and of the counterclaim.

It is so ordered.

Dated, Signed and Delivered via electronic mail at Nairobi on this 21st day of May, 2020.

MWANGI NJOROGE

JUDGE, ELC, KITALE.